

Case Note

Monitoring Motherhood

Whitner v. State, No. 24468, 1996 S.C. LEXIS 120 (S.C. July 15, 1996).

[A pregnant woman's] suffering is too intimate and personal for the state to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹

In *Whitner v. State*,² the South Carolina Supreme Court upheld the conviction of Cornelia Whitner for criminal child neglect for taking cocaine during her pregnancy. The court explained that "the word 'child' as used in [the state's child abuse] statute includes viable fetuses."³ The first state court of last appeal to uphold such a conviction, the South Carolina court declined to engage the policy implications of its decision⁴ and refused to address the constitutional repercussions on rights ranging from liberty to due process to the right to procreate to sex and race equality.⁵ This Case Note argues that by failing to recognize the unique relationship that exists between a pregnant woman and her fetus, the *Whitner* court forged a policy that will redound to the detriment of women.

Cornelia Whitner's son was born with cocaine metabolites in his system; at trial, Whitner admitted that she took cocaine during the third trimester of her

1. *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

2. No. 24468, 1996 S.C. LEXIS 120 (S.C. July 15, 1996).

3. *Id.* at *2.

4. *See id.* at *12-14 (insisting court will address only facts at hand, not policy concerns of defendant)

5. The *Whitner* court found that none of the constitutional issues were raised on appeal. *See id.* at *24. For a full discussion of the constitutional rights implicated by cases like *Whitner*, see, for example, Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 526-45 (1992); Lynn M. Paltrow, *When Becoming Pregnant is a Crime*, 9 CRIM. JUST. ETHICS 41, 44 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1462-81 (1991), and Doretta Massardo McGinnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 508-21 (1990).

pregnancy.⁶ Writing for a majority of the court, Associate Justice Jean Toal found that it was consistent with the intent of the South Carolina legislature and with the purpose of the state child abuse statute to include viable fetuses within the meaning of the word "person" and, therefore, within the purview of the statute.⁷ "South Carolina law," the court wrote, "has long recognized that viable fetuses are *persons* holding certain legal rights and privileges."⁸

Many state courts have previously considered whether women can be convicted for taking cocaine while pregnant.⁹ As the *Whitner* court itself recognized, however, no other state court of last appeal has upheld such a conviction.¹⁰ In support of its holding, the *Whitner* court cited state precedents upholding wrongful death claims involving viable fetuses¹¹ as well as criminal prosecutions for feticide against parties other than the mother.¹² The court argued that it would be "absurd" in light of these cases not to recognize a viable fetus as a person for purposes of the child abuse statute.¹³ The court also appealed to the United States Supreme Court's abortion jurisprudence to support its argument that the state has a compelling interest

6. See *Whitner*, 1996 S.C. LEXIS 120, at *3. *Whitner* pleaded guilty to child neglect before the circuit court. After she was imprisoned, she sought postconviction relief claiming that the circuit court lacked subject matter jurisdiction to accept her plea and that she had received ineffective assistance of counsel. The postconviction relief court reversed her conviction on both grounds and the state appealed. See *id.*

7. The version of the statute under which *Whitner* was charged states:

Any person having the legal custody of any child or helpless person, who shall . . . refuse or neglect to provide . . . the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished.

Id. at *5-6 (quoting S.C. CODE ANN. § 20-7-50 (Law Co-op. 1985)).

8. *Id.* at *6 (emphasis added).

9. Women have been prosecuted under two theories. First, they have been charged under drug laws for delivering cocaine to a fetus. Such cases turn on courts' deciding whether "delivery" encompasses ingesting cocaine during pregnancy and do not require courts to reach the question of whether a fetus is a person because the "delivery" is said to occur after the child's birth, but before the umbilical cord is cut. State appellate courts have rejected this theory. See, e.g., *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992); *State v. Luster*, 419 S.E.2d 32, 35 (Ga. Ct. App. 1992); *People v. Hardy*, 469 N.W.2d 50, 52-53 (Mich. Ct. App. 1990). Second, pregnant women have been charged under child abuse statutes. Until *Whitner*, all state appellate courts had overturned such convictions. See, e.g., *Reyes v. Superior Court*, 141 Cal. Rptr. 912, 915 (Ct. App. 1977); *Commonwealth v. Welch*, 864 S.W.2d 280, 284 (Ky. 1993); *Sherriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994); *State v. Gray*, 584 N.E.2d 710, 713 (Ohio 1992).

10. See *Whitner*, 1996 S.C. LEXIS 120, at *14-15.

11. See *id.* at *6-8 (discussing *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964) (applying wrongful death statute to mother whose viable fetus was not born alive); *Hall v. Murphy*, 113 S.E.2d 790 (S.C. 1960) (applying wrongful death statute to mother whose infant died after birth because of prenatal injuries)). But cf. *Roe v. Wade*, 410 U.S. 113, 162 (1973) (arguing that tort action appears "to vindicate the parents' interests and is thus consistent with the view that the fetus, at most, represents only the potentiality of life").

12. See *Whitner*, 1996 S.C. LEXIS 120, at *8-9 (discussing *State v. Horne*, 319 S.E.2d 703 (S.C. 1984) (recognizing crime of feticide under murder statute)). Not all courts agree that feticide can be recognized under homicide statutes. See, e.g., *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970).

13. See *Whitner*, 1996 S.C. LEXIS 120, at *9. The court, however, ignores the fact that at common law a woman was exempt from criminal liability for aborting her fetus, in recognition of her right to control her own body, even if third parties were not. See JAMES C. MOHR, *ABORTION IN AMERICA* 20-45 (1978); see also, e.g., *State v. Carey*, 56 A. 632, 636 (Conn. 1904) ("At common law an operation on the body of a woman quick with child, with the intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body . . .") (emphasis added).

in the life of a viable fetus.¹⁴ Finally, the court rejected *Whitner*'s contention that South Carolina precedent supported recognizing fetal rights only when such recognition would protect a parent's interest in the fetus, rather than a state interest.¹⁵ The court refused to "insulate[] the mother from all culpability for harm to her viable child. . . . [T]he rationale underlying our body of law [is the] protection of the viable fetus."¹⁶

Far from protecting fetuses, however, prosecutions such as *Whitner*'s may actually be harmful to fetal health. Faced with the prospect of criminal liability, for example, many drug-using women will simply avoid prenatal care for fear of detection.¹⁷ Others might choose to abort rather than risk imprisonment.¹⁸ This problem is compounded by the fact that the threat of liability after *Whitner* is not limited to cocaine use. As the dissent pointed out, the court's opinion "render[s] a pregnant woman potentially criminally liable for myriad acts which the legislature has not seen fit to criminalize."¹⁹

Furthermore, the child abuse statute, as construed by the *Whitner* court, does not even require that the woman's actions actually harm her fetus for her to be liable.²⁰ It merely requires that her actions are "likely to endanger" the fetus.²¹ Given the diversity of views on the panoply of activities that have the

14. See *Whitner*, 1996 S.C. LEXIS 120, at *19 (citing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113, 165 (1973)). The *Whitner* court ignored *Roe*'s explicit statement that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158. The state interest defined in *Casey* is one in the "potentiality of human life," 505 U.S. at 879, not in a "person."

15. See *Whitner*, 1996 S.C. LEXIS 120, at *18.

16. *Id.* at *20. This is a dubious claim. As the dissent states, "[T]he failure of the legislature on eleven occasions to pass proposed bills addressing the problem of drug use during pregnancy is evidence the child abuse and neglect statute is not intended to apply in this instance." *Id.* at *30 (Moore, J., dissenting).

17. See CENTER FOR REPROD. LAW & POLICY, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY 11 (1996) (noting opposition of American Medical Association, American Academy of Pediatrics, American Nurses Association, American Public Health Association, among others, to prosecuting pregnant women because such prosecutions might cause women to avoid prenatal care).

18. See *Roberts*, *supra* note 5, at 1445. For advocates of fetal rights, abortion is obviously not an acceptable solution; it is the greatest possible harm. Policies that focus on drug treatment and addiction prevention would protect the fetus without the adverse consequences that may follow the *Whitner* holding.

19. *Whitner*, 1996 S.C. LEXIS 120, at *31-32. The court itself recognized this possibility. See *id.* at *13-14 (stating that it would not be absurd to prosecute parents for legal acts that potentially endanger viable fetus). Women have already been prosecuted for child abuse for engaging in a variety of legal activities while pregnant. See *Paltrow*, *supra* note 5, at 43 (describing prosecutions of pregnant women for activities such as drinking alcohol and having sex against doctor's advice); Don Terry, *In Wisconsin, a Rarity of a Fetal-Harm Case*, N.Y. TIMES, Aug. 17, 1996, at A6 (discussing Wisconsin case in which woman was charged with attempted homicide for drinking excessively in hours before giving birth).

20. In fact, as the *Whitner* court itself conceded, see 1996 S.C. LEXIS 120, at *14, the effects of cocaine on a fetus are not clear. See, e.g., Linda C. Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406, 406 (1992) ("Available evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine on the course and outcome of child growth and development."). Cornelia *Whitner*'s son is now a healthy eight-year old boy whose mother has already spent 19 months in prison and will now serve an additional eight-year sentence. See Robin Abcarian, *A New Strategy for Pregnancy Police?*, L.A. TIMES, Sept. 18, 1996, at E1.

21. *Whitner*, 1996 S.C. LEXIS 120, at *5-6 (quoting S.C. CODE ANN. § 20-7-50 (Law Co-op. 1985)).

potential to harm a woman's fetus, from smoking²² to eating the wrong foods,²³ pregnant women are constantly vulnerable to prosecution under the *Whitner* court's theory.²⁴ The court also ignored the racial implications of this increased vulnerability: Black women have been and are likely to be the primary targets of such prosecutions.²⁵

The *Whitner* holding thus represents a substantial incursion into the liberty interests of pregnant women, and therefore of all potentially pregnant women,²⁶ in South Carolina. As such, *Whitner* evokes a history of judicial attempts to control the behavior of pregnant women and the practice of motherhood.²⁷ Courts have long sought to regulate motherhood, invoking the language of fetal protection to impose a duty on a woman to curtail her choices in the name of protecting her fetus.²⁸ As Reva Siegel points out, "[i]mposing this duty on the pregnant woman seems reasonable because we assume that mothers should live 'for' their children; the argument acquires its persuasive force from unarticulated assumptions about the maternal role."²⁹

22. One of the official Surgeon General's official warnings on cigarettes states: "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and low Birth Weight."

23. See, e.g., ARLENE EISENBERG ET AL., WHAT TO EAT WHEN YOU'RE EXPECTING 189-98 (1986).

24. See, e.g., *Reinesto v. Superior Court*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995) (discussing range of activities that could harm fetus and dismissing charges against defendant for child abuse for taking heroin while pregnant). The potentially enormous breadth, and corresponding potential for selective enforcement, of the *Whitner* holding may render the statute, as interpreted by the *Whitner* court, unconstitutionally vague. Cf. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (holding vagrancy ordinance void for vagueness because of lack of notice and resulting unfettered police discretion).

25. See Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569, 576-606 (1992) (discussing statistical evidence that black women are primary targets of such prosecutions); Roberts, *supra* note 5, at 1421 (arguing that prosecutions of poor black women for their behavior while pregnant is punitive policy that punishes them for making reproductive choices and reflects racist attitudes of authorities).

26. Since a woman's behavior before conception or before knowledge of conception can affect the health of the fetus she is carrying, fetal protection policies affect all fertile women. See Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 288-89 (1990). The fetal protection policy in *UAW v. Johnson Controls, Inc.*, for example, which the Supreme Court held violated Title VII of the Civil Rights Act of 1964, excluded all women "capable of bearing children" not only from any "jobs involving lead exposure," but also from any job "which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." 499 U.S. 187, 192 (1991) (emphasis added).

Note that men are socially defined as nonparents. In *Johnson Controls*, for example, one male plaintiff had been denied a leave of absence that he had requested in order to lower his lead level because he wished to become a father. See *id.* at 192. Similarly, although there is scientific evidence that male cocaine use can affect a fetus, no man has ever been prosecuted for child abuse on these grounds. For a scientific study suggesting that male cocaine use affects fetal development, see Ricardo A. Yaziki et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956 (1991).

27. See generally Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (analyzing how courts have reasoned historically about women's maternal obligations using physiological language about women's bodies).

28. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421 (1908) ("[A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."); *UAW v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989), *rev'd*, 499 U.S. 187 (1991). See generally Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986) (examining history of fetal protection policies and their legality under Title VII of Civil Rights Act of 1964).

29. Siegel, *supra* note 27, at 342 n.331.

These unarticulated assumptions draw upon a range of moral and social intuitions about how mothers should behave and what they should sacrifice for their children. These assumptions then shape people's intuitions about how a pregnant woman should behave in order to deliver a healthy child. This transitive reasoning is possible through the equation of the role of a mother and that of a pregnant woman and the corollary equation of proper maternal behavior with proper gestational behavior. These are the highly suspect equations without which the *Whitner* court could not have applied a child abuse statute to a woman's "treatment" of her fetus in utero.

By defining the "plain meaning of the word person"³⁰ to include a fetus, the South Carolina court treated a fetus as a separate person unconnected to the woman within whom it exists.³¹ Under this interpretation of the child abuse statute, the relationship between a future mother and her fetus is categorically indistinguishable from other custodial relationships.³² This categorization denies the uniqueness of the relationship between a pregnant woman and her fetus: Unlike any other relationship, the fetus is physically situated in its entirety inside a woman.³³ As the Illinois Supreme Court observed in dismissing a tort claim brought on behalf of a fetus against its mother: "[T]he whole life of the pregnant woman . . . impacts on the development of the fetus. . . . [T]he mother's every waking and sleeping moment . . . shapes the prenatal environment which forms the world of the fetus. That this is so is not a pregnant woman's fault: it is a fact of life."³⁴

Given this unique relationship, there is a logical gap in the transitive reasoning by which the *Whitner* court ascribed to a fetus the childhood right of protection from potential endangerment and ascribed to a pregnant woman the duties of motherhood. In this logical gap lies a critical distinction between moral intuitions and legal rights. The *Whitner* court, like many individuals, displays strong moral intuitions about how a pregnant woman should behave: She should take seriously her responsibility to the fetus growing within her and subjugate her desires for its benefit. Not every form of admirable behavior, however, gives rise to another's legal right to that behavior. Conversely, not every instance of socially reprehensible behavior corresponds to an infringement of another's rights.³⁵ It is not socially admirable behavior to take

30. *Whitner v. State*, No. 24468, 1996 S.C. LEXIS 120, at *9, *22 (S.C. July 15, 1996).

31. In the court's scenario, the fetus and woman are not merely unconnected, they are in a combative relationship. For a critique of this "adversarial model," see Johnsen, *supra* note 25, at 576-606.

32. There is the generic relationship described, in statutory language, as: "[a]ny person having the legal custody of any child or helpless person." *Whitner*, 1996 S.C. LEXIS 120, at *5 (quoting S.C. CODE ANN. § 20-7-50 (Law Co-op. 1985)).

33. The *Whitner* court argued that if it were to interpret the statute differently, "there would be no basis for prosecuting a woman who kills her viable fetus by stabbing it, by shooting it, or by other such means." *Id.* at *20. This argument ignores that a woman cannot stab or shoot her fetus without stabbing or shooting *herself*, a fact that should alter dramatically the court's image of the ruthless murderer.

34. *Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill. 1988).

35. Judith Jarvis Thomson describes two brothers, one of whom has been given a box of chocolates

cocaine while pregnant. Unfortunately, however, the South Carolina Supreme Court has granted fetuses a broad set of rights as a legal panacea to a social problem. Far from a panacea, the court's solution ignores the costs to women of creating such rights. As Nancy Rhoden has argued in discussing forced Cesarean sections, "[i]t is far better that some tragic private wrongs transpire than that state-imposed coercion of pregnant women become part of our legal landscape."³⁶

For women, the *Whitner* decision spells the loss of the autonomy and liberty to make personal behavioral choices. As a society, we allow people the autonomy to choose to act in ways that might jeopardize their well-being.³⁷ We also recognize that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."³⁸ *Whitner* could signify the end of this liberty interest for women in South Carolina who are now bound by the court's vision of motherhood, one that constructs pregnant women as mothers with obligatory moral responsibilities.³⁹ The danger of this vision is that when women are viewed first and foremost as mothers, the social roles available to them are restricted. As Kristin Luker argues, "when personhood is bestowed on the embryo, women's nonreproductive roles are made secondary to their reproductive roles. . . . [A woman] is defined by the fact that she is—or may become—pregnant."⁴⁰ When this occurs, a woman risks imprisonment for following "her own conception of her spiritual imperatives and her place in society."⁴¹

—Ariela R. Dubler

There he sits, stolidly eating his way through the box, his small brother watching enviously. Here we are likely to say "You ought not to be so mean. You ought to give your brother some of those chocolates." My own view is that it just does not follow from the truth of this that the brother has any right to any of the chocolates. If the boy refuses to give his brother any, he is greedy, stingy, callous—but not unjust.

Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 60 (1971).

36. Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL. L. REV. 1951, 1953 (1986); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992) (stating, in upholding woman's right to abortion, "[o]ur obligation is to define the liberty of all, not to mandate our own moral code").

37. See, e.g., *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . ."). The *Whitner* court might argue that a pregnant woman's autonomy is constrained by the fetus inside her. As the *Whitner* dissent points out, however, a woman in South Carolina can abort a viable fetus in order to preserve her health. See 1996 S.C. LEXIS 120, at *32 n.1 (Moore, J., dissenting). This indicates at least some recognition of a woman's autonomy, and suggests that a woman's relationship to her fetus differs from her relationship to an independent person in a critical way: Clearly a woman in South Carolina may not kill a person in order to preserve her health; she can, however, abort her viable fetus.

38. *Casey*, 505 U.S. at 847 (1992).

39. See *supra* notes 26–28 and accompanying text. Dorothy Roberts argues that social constructions of motherhood, which are both patriarchal and racist, devalue and discourage black motherhood at the same time that they attempt to compel white motherhood. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 224, 229–32 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

40. KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 200 (1984).

41. *Casey*, 505 U.S. at 852 (1992).